

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KENNETH ELLERY AMEY,

Defendant-Appellee.

UNPUBLISHED

February 3, 2005

No. 250599

Genesee Circuit Court

LC No. 03-011720-FH

Before: Zahra, P.J., and Neff and Cooper, JJ.

MEMORANDUM.

The prosecution appeals by delayed leave granted from the circuit court's order dismissing a count of operating a motor vehicle while under the influence of a controlled substance (OUIL), MCL 257.625(1), against defendant. We affirm, but on alternative grounds.

Defendant filed a motion with the circuit court to dismiss his OUIL charge on the ground that the police retained possession of a blood sample taken from him for too long and that he was therefore unable to timely arrange for his own blood-alcohol test. See MCL 257.625a(6)(d). The circuit court agreed with defendant and dismissed the OUIL charge. The case was then sent to the district court for adjudication of the sole remaining charge, a misdemeanor charge of driving on a suspended or revoked license. MCL 257.904(3)(a). Defendant pleaded guilty in the district court, partly in reliance on the prosecution's agreement not to continue to prosecute the OUIL charge, and was sentenced to pay a fine and serve three days' incarceration in jail.

The prosecution nonetheless obtained leave to appeal the circuit court's initial decision to dismiss the OUIL charge, and resisted defendant's motion to dismiss the appeal after leave was granted.

Defendant has shown to our satisfaction that the prosecuting attorney signed a motion and order of *nolle prosequi* in connection with the OUIL charge, attendant to the plea agreement under which defendant was convicted and sentenced in connection with the remaining charge. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v New York*, 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971). Given

defendant's unchallenged account of having served a sentence pursuant to a plea arrangement, to which the prosecutor agreed, which confirmed that count I, or the OUIL charge, would be dropped, and the prosecution's failure to address this issue on its merits,¹ we hereby affirm the circuit court's initial decision to drop the OUIL charge on the alternative ground that the prosecution waived objections by agreeing to the subsequent plea arrangement.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper

¹ The prosecution's argument in this regard consists of pointing out that this Court granted leave to appeal limited to the merits of the circuit court's decision to dismiss the OUIL count against defendant, and argues that defendant's procedural arguments against disturbing the result below are thus not before this Court. However, this Court's decision to grant leave for a single issue was a limitation on the prosecution's right to prosecute the appeal, not on defendant's right to argue alternative grounds for affirmance. Moreover, when this Court denied defendant's motion to dismiss, predicated on those procedural grounds, it did so "without prejudice to presenting the issue raised in the motion to dismiss before the case call panel."